

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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29990

FILE: B-215922; B-215922.2

DATE: December 12, 1984

MATTER OF: William A. Stiles, Jr.;  
Piazza Construction, Inc.

## DIGEST:

1. Protest based upon alleged improprieties apparent in a request for proposals must be filed prior to the closing date for receipt of proposals.
2. GAO does not review affirmative determinations of responsibility absent a showing of possible fraud on the part of contracting officials or an allegation that definitive responsibility criteria have been misapplied.
3. New grounds of protest must independently satisfy the timeliness requirements of GAO's Bid Protest Procedures. Grounds of protest which are raised more than 10 working days after the basis is known are untimely and not for consideration on the merits.
4. Floor plan which was labeled "sample" and which was enclosed with a request for a best and final offer cannot be properly construed to amend material terms of the solicitation.
5. Whether a proposal is technically acceptable is within the discretion of the contracting agency to determine and GAO will not disturb an agency's determination unless it is shown to be unreasonable. Where request for proposals stated that office space offered must be a minimum of 15,500 square feet, the rejection of a proposal offering 15,000 square feet was not unreasonable.

William A. Stiles, Jr. (Stiles), and Piazza Construction, Inc. (Piazza), protest the award of a lease to Western Division Investments (Western) under request for proposals (RFP) R6-84-20P issued by the United States

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Department of Agriculture, Forest Service, Sedro-Woolley, Washington, for office and related space.

The protests are denied in part and dismissed in part.

#### Stiles' Protest

Stiles argues that the method in the solicitation of calculating the "present value per square foot" of space offered as the basis for price evaluation, is not reflective of the true costs to the government in the leasing of the space.

Our Bid Protest Procedures require that protests based upon alleged improprieties in an RFP apparent on the face of the solicitation must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1984). Stiles' allegation concerning the method of price evaluation, raised in its protest which was filed after award was made, is untimely and will not be considered on the merits. See Belden Corporation, B-215478, June 19, 1984, 84-1 C.P.D. ¶ 647.

Stiles also argues that the awardee's offer does not comply with a solicitation provision which, according to Stiles, requires the successful offeror, prior to award, to provide evidence of compliance with local zoning laws or evidence of variance, if any, approved by the proper local authority.

We do not agree. The clause in question only requires such evidence "within 15 days of its request by the Contracting Officer." Similarly, Schedule D(3), Zoning, states that "offerors may be required to furnish evidence that their property is zoned in conformance with the government's intended use." In a negotiated procurement, where the contracting officer has the option to require, prior to award, evidence of proper zoning, but need not do so if he does not believe it is necessary, zoning is considered to be an aspect of the contractor's responsibility (ability to perform), even if the solicitation couches the zoning requirement in terms of responsiveness. See 51 Comp. Gen. 565 (1972). Before award, a contracting officer must make an affirmative determination of the proposed awardee's responsibility. Our Office does not review protests concerning such determinations unless there is a showing of possible

fraud or bad faith on the part of contracting officials or an allegation that definitive responsibility criteria have been misapplied. Weldtest, Inc., B-216747, Oct. 22, 1984, 84-2 C.P.D. ¶ \_\_\_\_\_. Neither exception is applicable here.

Further, Stiles contends that the awardee was awarded technical points for a road which was offered as an option in its proposal but, when the awardee's price was evaluated, the cost of the optional road was not included. Stiles contends that the effect of this was to give the successful offeror an unfair point score advantage.

The contracting officer states, however, that the road in question was not a requirement of the solicitation and, therefore, no points were awarded for the optional road. We have reviewed the written record of the proposal evaluation and there is no indication that additional technical points were awarded to Western for the road. Therefore, this basis of protest is denied.

Stiles also protests against the awardee's reduction of its proposed price in its best and final offer. Stiles alleges that the awardee had access to information not available to any of the other offerors and no other offeror reduced its best and final price.

Stiles' allegation concerning inside information, unsupported by any evidence in the record, is regarded as pure speculation and will not be considered. Delmae Company, B-214082, July 10, 1984, 84-2 C.P.D. ¶ 36. Moreover, the reduction of an offeror's price in its best and final offer is neither unusual nor legally objectionable.

Stiles further protests the fact that the contracting officer made errors in calculating the present value of Stiles' and the awardee's offer. Stiles argues that its proper present value cost per square foot is \$67.23, instead of \$67.41, while the awardee's cost should have been \$67.56.

The Forest Service admits that an error was made in calculating Stiles' price. We find, however, that the error in calculating Stiles' offer and the alleged error in calculating the awardee's offered price were not prejudicial

because when the errors are corrected Stiles gains, at most, only a few price points and its offer is still over 30 total points lower than the awardee's (versus 40 before the price corrections).

In responding to the agency report, in a letter dated September 11, 1984, but filed (received) at GAO on September 17, 1984, the protester raised new protest grounds derived from the agency report. Stiles contends that its offer was not read in its entirety and that inadequate discussions were conducted with it prior to the submission of best and final offers. Stiles also contends that best and final offers were not evaluated by the entire evaluation board as were the initial proposals. Finally, Stiles contends that no additional points were given to it even though it made improvements in its best and final proposal, as requested by the contracting officer.

New grounds of protest, as these, must independently satisfy the timeliness requirements of our Bid Protest Procedures, 4 C.F.R. part 21 (1984). TRS Design & Consulting Services, B-214011, May 29, 1984, 84-1 C.P.D. ¶ 578. Stiles states that it received the agency report which formed the bases of these new grounds on August 29, 1984. Its new grounds of protest, filed with GAO on September 17, 1984, in response to the agency report, are untimely and will not be considered on the merits because they were not filed within 10 working days of when the bases were known. See 4 C.F.R. § 21.2(b)(2) (1984); Tracor Marine, Inc., B-207285, June 6, 1983, 83-1 C.P.D. ¶ 604.

#### Piazza's Protest

Piazza protests the rejection of its best and final offer. Piazza's best and final offer was considered technically unacceptable because it did not meet the minimum office space requirements of the solicitation. Piazza contends that it reduced the space offered to conform to a sample floor plan which was allegedly sent with the request for best and final offers.

Schedule "A," clause 2(b) of the solicitation states that offers must provide a minimum of 15,500 square feet of net usable office space. Clause 9(b)(6) of schedule "A" delineates 12 subdivisions of the office space. Piazza's best and final offer was for 15,000 square feet of net usable office space and included subdivisions not in conformance with clause 9(b)(6).

Piazza argues that its best and final offer was based on the sample floor plan which it allegedly received with the request for a best and final offer. The contracting officer states, however, that it never sent Piazza the floor plan which Piazza relied upon, but instead sent a floor plan which lacks dimensional measurements and clearly states that it was only to be used in assisting offerors to understand the preferred location of the various subdivided offices. We find it unnecessary to resolve this factual conflict.

Even assuming the floor plan which Piazza allegedly relied on was sent with the request for a best and final offer, it still would not have served to affect the office space requirements of the solicitation. The only reference that the request for a best and final offer made to the attached floor plan was as follows:

"Enclosed is a sample office floor plan. The Forest [Service] would prefer a rectangular floor plan as this design more fully meets their specific office organization needs." (Emphasis added.)

The above-quoted paragraph makes it clear that the enclosed floor plan was only a sample and was enclosed to illustrate that the Forest Service prefers a rectangular floor plan. This simple reference to the "sample" floor plan could not possibly serve to create an amendment to material requirements of the solicitation.

Our consideration now turns as to whether Piazza's best and final offer was properly rejected. Whether a proposal is technically acceptable is within the discretion of the contracting agency to determine and this Office will not disturb an agency's determination unless that determination is unreasonable. B&D Supply Company of Arizona, Inc., B-210023, July 1, 1983, 83-2 C.P.D. ¶ 50. The solicitation required that offerors provide a minimum of 15,500 square feet of office space. We conclude that the determination to reject Piazza's best and final offer, providing only 15,000 square feet of office space, was not unreasonable. See CDI Corp., B-209723, May 10, 1983, 83-1 C.P.D. ¶ 496.

Piazza, as did Stiles, argues that Western lacked the necessary zoning required prior to receiving an award under this solicitation. As discussed above, this argument involves a matter of responsibility which we do not review.

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Piazza's protest is denied.

*for* *Milton J. Dozlar*  
Comptroller General  
of the United States